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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY

Petitioner

vs.

MARTIN L. SWEENEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

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THE SCHENECTADY UNION PUBLISHING COMPANY,
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vs.

MARTIN L. SWEENEY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

The case is here on certiorari to review a judgment of the Second Circuit Court of Appeals (R. 36) which reversed a judgment of the District Court for the Northern District of New York finally dismissing a complaint in libel on the ground that it failed to state a cause of action against petitioner (R. 23-24).

Jurisdiction

Certiorari was applied for under Section 240(a) of the Judicial Code (28 U. S. C., §347(a)), and was granted by this Court on December 22, 1941, Mr. Justice JACKSON taking no part (R. 37).

Opinions Below

The opinion of the District Court is not officially reported but appears at R. 14-22. The prevailing opinion in the Circuit Court of Appeals, by Judge CHASE, and the dissenting opinion, by Judge CLARK, are reported in 122 F. (2d) 288 (R. 27-33). Judge CLARK likewise noted his dissent from the memorandum denial of the petition for rehearing (R. 35).

Statement

THE COMPLAINT

Respondent Martin L. Sweeney, a member of Congress from the State of Ohio, on December 13, 1939, instituted this action in the District Court for the Northern District of New York against petitioner, publisher of the *Schenectady Union Star,* basing jurisdiction on diversity of citizenship and the existence of the requisite amount in controversy.

The matter in suit, published on December 23, 1938, as a part of a column under the title "Washington Daily Merry-Go-Round," read as follows (R. 3):

> "A hot behind-the-scenes fight is raging in Democratic congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.
>
> "The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court.
>
> "This has aroused the violent opposition of Representative Martin L. Sweeney, Democrat of Cleveland, known as the chief congressional spokesman of Father Coughlin.
>
> "Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the

United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized 10 years later.

"Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment."

Respondent avers that the publication was intended to "deprive him of the respect, confidence and esteem peculiarly essential to [his] * * * office" (R. 3),[1] and "was meant and intended to convey that plaintiff was and is guilty of Un-American, racial prejudice against persons of Jewish origin and guilty of conduct unbecoming a public officer and to hold plaintiff in contempt in the eyes of his constituents * * *" (R. 3-4).

The complaint is grounded upon the claim that the publication is libelous *per se*, as no items of special damages are alleged. There is a general prayer for damages in the sum of $250,000 (R. 4).

Petitioner's Motion

Petitioner moved for judgment on the pleadings dismissing the complaint on the ground that it failed to state a cause of action (R. 13).

District Court Ruling and Opinion

In its opinion granting the motion, the District Court first held that the innuendo was not correct, as "the alleged libelous article does not say, nor does it necessarily carry the inference, that plaintiff is prejudiced against and intolerant of Jews as such" (R. 15). Assuming *arguendo*, however, that the article did charge respondent

[1] The complaint also makes reference to the fact that respondent is a lawyer, but both the District Court and the Circuit Court of Appeals exclude the claim that respondent was libeled in his profession as a lawyer since the publication does not refer to him in that capacity. Both opinions properly cite *Keene* v. *Tribune Assn.*, 76 Hun (N. Y.) 488, in support of this proposition (R. 20, 29).

with such prejudice, the court held it was not libelous *per se* under New York decisional law,[2] which was applicable to the case under *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 (R. 15). The court indicated that formulary definitions of libel *per se* in terms of exposing the plaintiff to "public contempt, ridicule, aversion," etc., while describing what must be the general effect or tendency of a publication before it can be held presumptively actionable, do not of themselves set up a sufficiently definite criterion for the decision of a particular case (R. 18). Decision will turn upon the specific circumstances *sub judice.* Here it is an important circumstance that a public official is involved. "In a constitutional republic where freedom of speech and the press is guaranteed, comment on, or criticism of the political or official acts or views of a public officer is not libelous *per se,* merely because it hurts his feelings or distresses him" (R. 19). The court cited and discussed authority in the Court of Appeals and the Appellate Divisions establishing the rule that, where the publication concerns a public official in a matter of public concern, no accusation short of a charge of corruption or definite misconduct or impropriety in office is libelous *per se* (R. 18-19). It further remarked upon the absurdity of a holding that a charge of racial prejudice in a matter of political appointment is presumptively actionable when it is known that "Prejudices relating to nationality and religion are quite common" and "many people have prejudices of some kind" (R. 21).

The motion to dismiss was accordingly granted, but apparently recognizing that a false statement, although not libelous *per se,* remains actionable in New York if specific items of damage can be alleged and proved,[3] the court

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[2] There is no New York statute defining civil libel.

[3] *Al Raschid* v. *News Syndicate Co.,* 265 N. Y. 1, 4; *O'Connell* v. *Press Pub. Co.,* 214 N. Y. 352; *Samson U. Corp.* v. *Dover Mfg. Co.,* 233 App. Div 155; *Husted* v. *Husted Co.,* 193 App. Div. 493; and see *infra,* p. 15.

granted respondent leave to amend (R. 23). On respondent's failure to amend, final judgment was entered in petitioner's favor (R. 23-24).

Majority Opinion in Circuit Court of Appeals

The majority opinion in the Circuit Court of Appeals interprets the article as charging respondent with racial prejudice (R. 20), and upon that basis holds it to be libelous *per se*.

Judge Chase relies upon three New York cases.

He quotes from *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99, 102, a general definition of words libelous *per se* as those which tend "to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society"; and he says that *Sydney* v. *MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208, is to the same effect.

Conceding that "It is, of course, not easy to apply the general test to a case of this nature," and that "Opinions or prejudices concerning the matter in hand might well lead to different conclusions" (R. 30), Judge Chase proceeds straightway to attempt to apply the general definition to the case in hand. He does not seem to attach special significance to the fact that a public official is involved, and fails to cite or distinguish the bulk of cases upon which the District Court rested in its discussion of the public official rule. The only public official case cited by Judge Chase is *Bennet* v. *Commercial Advertiser Assn.*, 230 N. Y. 125, and of this he says that "when made of a public official, false accusations which may well lead right-thinking people to believe him unworthy of public trust and confidence are libelous *per se*" (R. 30). (In fact the Court of Appeals in the *Bennet* case used quite different

language,[4] and both the language and the facts of that case support the public official rule.)

The rest of the Judge's opinion is devoted to stating what appears to be the Judge's own view of the policy considerations involved, without reference to those enunciated by the authorities in New York. In this connection he observes that the article was probably hurtful to respondent among those persons who hate racial or religious intolerance, and that freedom of speech is not a license to spread damaging falsehoods (R. 31).

Dissenting Opinion in Circuit Court of Appeals

In dissenting, Judge Clark states that the decision of the majority is "not in accordance with New York law" (R. 31). He rests upon the *Bennet* case in the Court of Appeals and the decisions of the Appellate Divisions in *Tanzer* v. *Crowley Pub. Corp.*, 240 App. Div. 203; *Gardner* v. *Home Life Pub. Inc.*, 237 App. Div. 200; and *Hills* v. *Press Co.*, 122 Misc. 212, *aff'd*, 214 App. Div. 752, in support of the New York rule applicable to public officials (R. 31-32).

He observes that this view of the problem presented by the case seems general, as shown by the prevailing results in the seventy-five actions[5] brought by respondent in his home State and in other jurisdictions throughout the country based on the same or substantially the same publication (R. 32). Judge Clark calls particular attention to the opinions in *Sweeney* v. *The Beacon Journal Pub. Co.*, 66 Ohio App. 475, *app. dism.*, 138 Ohio St. 330; *Sweeney* v. *Newspaper Printing Corp.*, 177 Tenn. 196 (*per* Green, *C.J.*), and *Sweeney* v. *Capital News Pub. Co.*, 37

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[4] The words just quoted from Judge Chase's opinion are seemingly taken from the last paragraph of the *Bennet* opinion, but the precise language used by the Court of Appeals was "unworthy of public trust *and* a *betrayer* of civic confidence" (p. 132; italics ours).

[5] See the Petition for Rehearing.

F. Supp. 355 (D. Ida.). (Since the date of the decision under review, Judge ALLRED in the United States District Court in Texas has dismissed a complaint, filing a comprehensive opinion which takes sharp issue with the reasoning of the majority herein. *Sweeney* v. *Caller-Times Pub. Co.*, 41 F. Supp. 163, Aug. 21, 1941.)[6]

The "new law at least for New York State" created by the majority decision is "definitely disturbing law" (R. 32), and destructive of a free press. Judge CLARK says (R. 32-33):

> "• • • It would be a fine world to live in if only tolerance were so usual that a charge of the lack thereof against a public official could be so presumptively untrue that it would seem on its face unfair and libelous. But in our present world we must not take the naive view that what ought to be is, and that whoever suggests the contrary is a slanderer; for if we do so, we shut off all healthy criticism of prejudice, and allow bigotry full scope to act with impunity. Even more dangerous is the rationale of the decision that a comment leading an appreciable number of readers to hate or hold in contempt the public official commented on is libelous *per se*. Its broad sweep would take in comments found day after day in the most conservative newspapers, either in direct statement or as quotations of responsible critics, that a public official, particularly a legislator, is pro- or anti-labor, or pro- or anti-Nazi, or pro or anti this or that race, color, or creed. Minority comment on labor, religious and political views and activities of politicians becomes therefore hazardous. And the making of fine distinctions in rationale is indicated by the implication that a comment suggesting plaintiff's objections to the judicial candidate for his foreign birth alone would have been proper. Of course, the uncertain threat of

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[6] The two unreported decisions by HOLLY, *D. J.*, in the Northern District of Illinois, Eastern Division, holding the articles there involved to be libelous *per se* (*Sweeney* v. *Joliet Printing Co.*, No. 1204, and *Sweeney* v. *Illinois Pub. & Print. Co.*, No. 1201 [1940]), were distinguished by the District Court and the dissenting Judge herein (R. 20, 32). See also *infra*, pp. 41-42.

suit, invited by a rule at once so vague and so extensive, is a restriction on freedom of the press almost as direct as a rule of clear liability.

"I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, as the *Tanzer* case suggests, and hence not a matter of explicit proof or disproof. The public official will always regard himself as not bigoted, and will so testify, sincerely enough. And then the burden of proving the truth of the defense will rest upon the commentator, who must sustain the burden of showing his inference true. If he fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established. But the common-law requirement of proof of special damages gives him the protection he needs, while at the same time it does prevent him from causing really serious injury and loss by false and unfair statements. That should be the rule applied here, as the district court held."

Specification of Error

The Circuit Court of Appeals erred in holding that the complaint states a cause of action against petitioner, and in reversing the judgment of the District Court and failing to affirm the same.

Statute and Constitutional Provisions Involved

The Rules of Decision Act (Judiciary Act of 1789, c. 20, § 34, 28 U. S. C., § 725) provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Also pertinent are the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and the "free speech" and "due process" clauses of the Constitution of the State of New York (Article I, Section 8; Article I, Section 6).

POINT I

The writing at bar must be held not libelous *per se* under the New York rule respecting public officials, and under the independently applicable New York rule respecting imputations of state of mind or opinion on matters of public concern.

(A) Question of Law Presented

The Circuit Court of Appeals construed the statement that Congressman Sweeney opposed the nomination of Freed as Ohio District Judge because Freed was "a Jew, and one not born in the United States," as tantamount to a charge that the Congressman was actuated by racial or religious prejudice.

We disagree with this interpretation and shall state the reasons for our disagreement below (see Point IV); but for purposes of the present Point we assume it to be correct. On this assumption the question is, whether the gravest sanction of the law of libel—liability without proof of special damages—should attach to a writing concerning

a public official, in respect to a matter of public interest, which, while not imputing to him incompetence or corruption in office, incorrectly asserts that he entertains a state of mind or opinion[1] deemed to be prejudiced by some respectable members of the public.

That question was answered in the affirmative by a majority of the court below, and with no expressed limitation on the broad sweep of the doctrine thus enunciated.[2]

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[1] For purposes of the New York rule as to public officials, hereinafter discussed (section (C) of this Point), we need not mark any distinction between "act" and "state of mind" or "opinion."

Correct appraisal of the case is assisted, however, by noting that there was nothing wrongful in merely opposing Freed for District Judge and to charge that the Congressman had done so would not be libelous; the sting of the alleged libel, if any, must reside in the implication that he had done so because he had a certain state of mind or opinion concerning Jews or foreign-born Jews as candidates for public office. This factor is stressed in section (D) of this Point.

[2] The scope of the decision below may be illustrated in the context of the present litigation. In *Sweeney* v. *Caller-Times Pub. Co.*, 41 F. Supp. 163 (D. Tex.), the publication sued on contained two paragraphs which were cut out of the "Merry-Go-Round" column as it appeared in petitioner's newspaper. These paragraphs stated that there were other persons on the Bar Association's preferred list; one had eliminated himself for physical reasons; two were eliminated by Justice Department officials "because of big business or reactionary connections"; one was eliminated because he was "a Catholic and the last two judicial appointments in Ohio have been Catholics." So the Department turned to Freed. Was this a libel on officials of the Justice Department as charging them with being anti-big business or anti-Catholic? Or on the persons accused of reactionary connections? It would seem so, under the decision herein.

Again, we noted in our Reply Brief on Certiorari that Congressman Sweeney recently sued a Cleveland newspaper on the basis of an alleged misquotation which carried the implication that the Congressman was *anti-Polish*. The complaint was held insufficient in law by the Court of Appeals of Ohio, Eighth District (*Sweeney* v. *The Scripps Pub. Co.*, Dec. 1, 1941, memo.), in line with the earlier Ohio decision in the "Merry-Go-Round" litigation (*supra*, p. 6). But it is clear from respondent's own behavior that an "anti-Polish" case, and thousands like it, fall flatly within the rationale of the majority's opinion herein, as Judge CLARK observed.

(B) Majority's Fallacious Analysis of New York Law

The decision below rests substantially upon the language of two cases—*Kimmerle* (262 N. Y. 99) and *Sydney* (242 N. Y. 208)—"defining" the whole concept of libel *per se* in terms of tendency to expose the plaintiff to "ridicule and contempt." The majority attempts to apply the "definition" as if it were the major premise of a cover-all syllogism, and the true meaning of the words could be established by reference to a dictionary. It apparently does not recognize that the "definition" contains words of art whose meaning must be sought in the holdings of cases, and that the "definition" yields, in the process of actual decision, to more specific formulations in terms of the identity of the plaintiff and the occasion and type of utterance involved. There is no attempt in the majority opinion to analyze the facts of the cited cases, which are in reality as far removed from the facts of the present case as can well be imagined. (*Kimmerle* involved slurs cast upon the proprietor of a rooming house who had allegedly become friendly with a self-confessed wife murderer; held, no libel. *Sydney* concerned imputations on the chastity of a married woman referred to in the publication as Fatty Arbuckle's latest lady love.) The majority omits mention of cases, including cases cited by the District Court and the dissenting Judge, and including cases in the State courts of intermediate appeal, which do, on their facts, resemble the case at bar. And it does not attempt to grapple with the considerations of policy which are at the base of the New York law of libel. We submit that this is not the proper way to "find" law, and by the same token it is not the proper way to find State law under the rule of *Erie Railroad Co.* v. *Tompkins.*[3]

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[3] A similar approach by English courts of the early nineteenth century to the question of libel evoked the following satiric thrust from Jeremy Bentham: "* * * in point of actual law, a libel is any paper in which he, who to the will adds the power of punishing for it, sees anything that he does not like: * * *" ELEMENTS OF THE ART OF PACKING AS APPLIED TO SPECIAL JURIES PARTICULARLY IN CASES OF LIBEL LAW (London 1821), p. 2.

It is obvious that the "definition"—and actually many differing "definitions" are rehearsed in the cases[4]—is the barest indication of the content of a great, diversified branch of the law of torts. The "definition" affords no real guide in the decision of a particular case. This appears implicitly in the very *Kimmerle* opinion (see at p. 102). Statements apparently exposing persons to the kinds of public regard mentioned in the "definition" have been held not presumptively actionable; and contrariwise, statements apparently not affecting persons in those ways have been held presumptively actionable. See, *e. g., Rose* v. *Daily Mirror, Inc.*, 284 N. Y. 335; *Katapodis* v. *Brooklyn Spectator, Inc.*, 287 N. Y. 17; *Kloor* v. *New York Herald Co.*, 200 App. Div. 90; *Lamberti* v. *Sun Printing Assn.*, 111 App. Div. 437; *Cohen* v. *New York Times Co.*, 153 App. Div. 242; *Schweikert* v. *New York Eve. Jo.*, 132 Misc. 169 (Sup. Ct.); *cf.* L. HAND, *C. J.*, in *Burton* v. *Crowell Pub. Co.*, 82 F. (2d) 154 (C. C. A. 2); *Sim* v. *Stretch*, 52 T. L. R. 669; *Clay* v. *Roberts*, 8 L. T. 397. Attempts by courts and textwriters to bring all the cases within one intelligible rubric have always failed, as inevitably they must. For definitions are useless and deceptive unless they are sufficiently narrowed and diversified to take account of those variations in the facts which make their appeal to the differing and competing considerations of social policy.

Under more vigorous analysis than was applied by the majority, the decided cases in New York are seen to yield particular rules or working hypotheses as to writings (1) relating to public officials in matters of public concern, and (2) relating to imputations of state of mind or opinion on matters of public concern. Each of these rules is applicable to this case. The District Court and the dissenting Judge rested principally on the first rule, but also adverted to the second consideration. The majority of the Circuit Court of Appeals observed neither rule.

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[4] See Seelman, LAW OF LIBEL AND SLANDER (1933), p. 4 ff.

(C) Public Official Rule in New York

Judge CLARK correctly says that in New York

> "the right of comment on a public official has been safeguarded in a practical way by 'a somewhat different rule' than in ordinary cases and 'a clear charge of corruption or gross incompetence holding one up to disgrace and contumely' is required"

before a statement concerning a public official will be held libelous *per se* (R. 31).

In support of this formulation of the public official rule, Judge CLARK cites and discusses the case of *Bennet* (230 N. Y. 125), *Tanzer* (240 App. Div. 203), *Gardner* (237 App. Div. 200), and *Hills* (122 Misc. 212, *aff'd*, 214 App. Div. 752), which are also cited and discussed in the opinion of the District Court. The effect of the decisions is given in the *Tanzer* case, as follows (p. 205):

> "One who holds public office must expect criticism. It may be captious, ill-timed and without foundation in fact,[5] but, outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely, there is no libel."

Restated, the rule is that, beyond any question of the putative effect of the publication on the mind of the reader in creating the kinds of distaste mentioned in the general

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[5] In his Brief Opposing Certiorari, respondent sought to distinguish the cases here relied upon on the alleged ground that they involved merely *"genuine criticism based upon facts indisputably true"* (Res. Br. 15), or, as he said in another place, *"genuine criticism based upon official acts uncontrovertibly true"* (Res. Br. 4). No such distinction is possible. In these cases, as in the case at bar, the complaints alleged that the publications containing assertions of fact were false, motions were made to dismiss the complaints as insufficient in law upon their face, and the courts indicated in their opinions that they were assuming that the publications were false in their entirety. The complaints were dismissed where the writings, although assumed to be false, did not charge "corruption or gross incompetence." See Pet. Reply Br. on Cert. 1-2.

definitions, no writing concerning a public official, as to a matter of public concern, will be held actionable *per se* unless it imputes to the official a behavior pattern involving corruption or gross incompetence. By reference to this rule the publication at bar is not libelous *per se;* not even the majority appears to claim otherwise.

The notions of policy which underlie this rule will be described at length below (Point II). In brief, the rule is based on a weighing and balancing of competing interests. New York believes that the interest of the public official in his personal comfort is not absolute and must on occasion yield to the interest in free, even if false discussion of official behavior and opinion; that persons who are thin-skinned usually have the choice of avoiding abuse by declining to throw themselves into the public arena through accepting public office or asking the favor of votes;[6] and that officials, protected as they are by certain extraordinary immunities from liability for their own utterances,[7] and usually enjoying readier access to the press than other people, have effective means of self-defense against false attacks other than resort to lawsuits.[8] These considerations, among others,[9] argue for a limitation of

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[6] See *United States* v. *Morgan,* 313 U. S. 409, 421.

[7] Thus respondent, with absolute immunity for utterances on the floor of Congress, has made remarks in the House about the present litigation. 87 Cong. Rec., p. A5634 (Nov. 25, 1941); 87 *id.*, p. A4039 (Aug. 6, 1941); 84 *id.*, p. 8694 (May 25, 1939). These utterances could be franked into New York without accountability for libel, according to express statute. N. Y. C. P. A., § 337.

[8] Compare FRANKFURTER, *J., dissenting* in *Bridges* v. *California,* ..... U. S. ....., ..., 86 L. Ed. 149, 169: "Presidents and governors and legislators are political officials traditionally subject to political influence and the rough and tumble of the hustings, who have open to them traditional means of self-defense."

[9] See Point II, *infra,* pp. 23-25. New York recognizes that the American public is traditionally skeptical in its acceptance of words cast out in political debate. See *Hills,* 122 Misc. at p. 215; *Gardner,* 237 App. Div. at p. 202; *cf. Lydiard* v. *Wingate,* 131 Minn. 355, 358.

the area of libel *per se* in respect to public officials. False charges of corruption or gross incompetence, however, remain presumptively actionable. And false charges falling short of such imputations, while not presumptively actionable, remain actionable when real injury can be shown, in the form of the suit for special damages (see Judge CLARK's dissent, R. 33; *Cortright* v. *Anderson*, 208 App. Div. 1, 3-4; *Duffy* v. *New York Evening Post Co.*, 109 App. Div. 471, 475; cases cited *supra*, p. 4, note 3).

1. CASES INVOLVING "A CLEAR CHARGE OF CORRUPTION OR GROSS INCOMPETENCE"

The majority reads the one public official case cited by it, *Bennet*, as deciding that "when made of a public official, false accusations which may well lead right-thinking people to believe him unworthy of public trust and confidence are libelous *per se*" (R. 30). If such were the test, virtually every statement made in the course of a political campaign or in partisan editorial comment would carry a potentiality of libel, since it is always the purpose of one side to show that the other is "unworthy of public trust and confidence." Actually the Court of Appeals, in the part of its opinion which the majority was seemingly restating, used the words "unworthy of public trust *and* a *betrayer* of civic confidence" (p. 132); and in another part of the opinion the court said that the plaintiff was charged with "serving the financial interests of a former client by the *betrayal* of his public duties" (p. 130). The present case involves no charge of "betrayal." In any event, however, the language of the court must be read in the light of the facts. Bennet, an attorney and a member of Congress, was accused of acting as a cheat by slipping a "joker" into a bill, against the public interest and in order to create huge unwarranted profits for his clients. Thus Bennet was accused of an underhanded act involving corruption in office. Judge CLARK correctly analyzes

the *Bennet* case (R. 31) which conforms to and supports the rule upon which he relies.

Similarly we find that other cases in New York cited in respondent's brief opposing certiorari, holding statements critical of public officials to be libelous *per se*, involved charges of gross incompetence or accusations of corrupt conduct.

Hamilton v. *Eno*, 81 N. Y. 116: Plaintiff was accused of accepting emolument from a pavement company for having recommended its product to the city.

Powers v. *Dubois*, 17 Wend. (N. Y.) 63: Plaintiff was accused of opposing a great public improvement "for private and sinister purposes"—prostituting the office for "the furtherance of his own private schemes."

Bingham v. *Gaynor*, 203 N. Y. 27: Plaintiff was accused of corruption, wilful violation of law, incompetence and scoundrelism.

Mattice v. *Wilcox*, 147 N. Y. 624: Plaintiff was accused of dishonesty and arrant incompetence.

De Hoyos v. *Thornton*, 259 App. Div. 1: Plaintiffs were accused of being "dictated to by gangsters."

Sumner v. *Liberty Pub. Corp.*, 240 App. Div. 118: Plaintiff was accused of deliberately eliminating competent employees and substituting incompetents.

Foley v. *Press Pub. Co.*, 226 App. Div. 535: Plaintiff was charged with "fixing" and "rigging" in connection with an official inquiry.

Cortright v. *Anderson*, 208 App. Div. 1: Plaintiff was accused of lining up with gamblers.

Lunn v. *Littauer*, 187 App. Div. 808: Plaintiff was accused during the World War of "being the agent of selfish and designing business men, seeking to gain 'big money' though his supposed in-

fluence in procuring shipping for their own products, in disregard of the rights of the nation."

Hoey v. *New York Times Co.*, 138 App. Div. 149: It was charged that plaintiff in "voting in opposition to the bill, was corruptly and improperly influenced by a desire to aid and assist the league • • • which, if it exists, must have been founded • upon bribery and corruption."

Cohalan v. *New York W. T. Corp.*, 172 Misc. 1061 (Sup. Ct): Plaintiff was accused of perversion of justice and deliberate suppression of testimony.

2. Cases Involving Less Than "a Clear Charge of Corruption or Gross Incompetence"

On the other hand, as Judge Clark says, New York cases "hold not libelous *per se* comments on public officers more directly suggesting corrupt motives than does the one here—which charges rather bigotry and prejudice than corruption or impropriety in office" (R. 31).

Duffy v. *New York Evening Post Co.*, 109 App. Div. 471: Plaintiff, a Republican, was said to be "Absolutely devoid of any knowledge of the customs of polite men. Does well in business, especially during Tammany regimes. Devotes his time and energy more to assisting the Tammany leaders than to working for his own nominal party. Is reported to be about to join Tammany openly soon. Apparently knows no more of and cares no more for political principles than he does of the silurian age in geology. Mixes in Tammany factional fights, to the detriment of the Republican Party. A most unworthy choice."

Tanzer v. *Crowley Pub. Corp.*, *supra*: Plaintiff was charged with appointing a city attorney to protect a client of the attorney who had filed handpicked assessment rolls.

Gardner v. *Home Life Pub. Inc., supra*: Plaintiff was accused of having declared the city's finances were sound the day before a huge deficit was announced.

Hills v. *Press Co., supra*: Plaintiff was accused of favoritism and unfairness and inactivity in office.

Cortright v. *Anderson, supra*: Plaintiff, running on the Prohibition ticket, was accused of being in fact a "wet."

Rossiter v. *New York Press Co.*, 141 App. Div. 339: It was charged that plaintiff's services "were not worth what he was paid."

De Hoyos v. *Thornton, supra*: Plaintiffs were accused of being "extravagant" and engaged in "ruthless spending."

Murden v. *Westchester County Pub., Inc.*, 252 App. Div. 890 (memo.), *app. den.*, 278 N. Y. 740: Plaintiff was accused of being an outsider who exercised a "dictatorship" over a village, the village trustees being his "trained seals" (see Rec. on App., pp. 13, 14).

Authority in other jurisdictions is in accord with the New York public official rule. For example, the following accusations have been held not libelous *per se*: "could be trusted to organize the House in the interests of brewery control," reactionary, "consistently wrong on every matter in which the interests of the people were involved" (*Lydiard* v. *Wingate*, 131 Minn. 355); "political traitor," without "honor, ability, or courage to fight his own battles," "nondescript," "nincompoop" (*Settlage* v. *Kampf*, 10 Ohio Dec. Rep. 822); political doubledealing, "political connivance or something worse" (*Barr* v. *Providence Telegram Pub. Co.*, 27 R. I. 101); "frequently affected mind" (*Mayrant* v. *Richardson*, 1 N. & McC. [S. C.] 347); "unfit to represent the people," "never did an honest day's work," "a confessed ignoramus," "unedu-

cated, lazy and ignorant" (*Sweeney* v. *Baker*, 13 W. Va. 158); see also, *Peck* v. *Coos Bay Times Pub. Co.*, 122 Ore. 408; *Shaw* v. *Crandon Printing Co.*, 154 Wis. 601; *Hoan* v. *Journal Co.*, 238 Wis. 311, *cert. den.*, Nov. 10, 1941; *Rustgard* v. *Troy*, 6 Alaska 338; Newell, SLANDER AND LIBEL (4th Ed., 1924), p. 57; and cases cited *supra*, pp. 6-7.

(D) New York Rule as to Imputation of State of Mind or Opinion on a Public Question

We have so far centered our discussion upon one factor in the case—that the publication concerned a public official. We now turn to another and different factor, wholly ignored by the majority below—that the sting of the alleged libel, if any, lies in the charge that respondent had a certain state of mind or entertained a certain opinion which influenced his position respecting a political appointment. Putting to one side that respondent is a public official, the inquiry is whether to write of anyone that he has an attitude on a matter of public concern which is condemned by some respectable people, may be held presumptively actionable.

New York holds against such liability, in deference to the importance of free discussion (which might obviously be cut off entirely, under the view of the majority, where all sides of a public question are condemned by differing but respectable segments of the public), and for other reasons of social policy which will be considered at greater length hereinafter (Point II).

Thus it is not libelous *per se* to write of a man that he sponsors legislation for selfish advantage at the expense of taxpayers generally (*Foot* v. *Pitt*, 83 App. Div. 76); is a "wet," even though purporting to be a "dry" (*Cortright* v. *Anderson*, *supra*, p. 3); "professing a particular religious belief supports another with the intention of soon becoming a convert to that other faith" (*Duffy* v. *New York Evening Post Co.*, *supra*, p. 475); is an advocate

of rum (*Flanagan* v. *McDermott Dairy Co.*, 132 App. Div. 166, 168); is a believer in the principles of anarchy (*Von Gerichten* v. *Seitz*, 94 App. Div. 130, 132);[10] "approves of Fascism, Nazi-ism and supports the cause of the Spanish rebels" (*Consolidated Press & Printing Co.* v. *New York W. T. Corp.*, N. Y. L. J., Jan. 31, 1938, p. 507 [Sup. Ct.]); is "anti-social," "un-American," "Fascist" or a "Hitlerite" (*McAuliffe* v. *Local Union No. 3*, 29 N. Y. Supp. [2d] 963 [Sup. Ct.]); is a "Bolshevik" or a "Red." *Petroff* v. *Sun-Herald Corp. Inc.*, N. Y. L. J., Aug. 18, 1923, p. 1609 (Sup. Ct.). And there is strongly reasoned authority that to charge a man with being a "Communist" is not libelous *per se*. *Garriga* v. *Richfield*, 174 Misc. 315 (Sup. Ct.—Pecora, *J.*).[11] See also, *National Variety Artists, Inc.* v. *Mosconi*, 169 Misc. 982 (Sup. Ct.); *Goldberger* v. *Philadelphia G. P. Co.*, 42 Fed. 42 (S. D. N. Y.).

Authority in other jurisdictions is to the same effect. See *Rutherford* v. *Dougherty*, 91 F. (2d) 707 (C. C. A. 3) ("we cannot say that to state the plaintiff's address foments religious hatred and bigotry is libelous"); *Sullivan* v. *Meyer*, 91 F. (2d) 301 (C. A. D. C.) (strong criticism of plaintiff's stand concerning the teaching of radical doctrine in public schools, held not libelous *per se*); *Snavely* v. *Booth*, 36 Del. 378 (not libelous *per se* to say of an educator that he favors the teaching of birth control in secondary schools—"We have been referred to no authority, nor have we been able, in an extended search, to find

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[10] Otherwise, of course, if the accusation is tantamount to a charge of criminal anarchy under the New York statute. *Id.*

[11] In *Levy* v. *Gelber*, 175 Misc. 746 (Sup. Ct.), the ruling was to the contrary, but the court lays stress on the fact that the publication was addressed to the plaintiff in his profession as a lawyer (which is not true in the present case, R. 20, 29), and emphasizes that recent legislation has imposed various definite disabilities on Communists (which is not true of persons having racial or religious prejudice). Although the decision is thus distinguishable, counsel believe the *Levy* case was improperly decided, is against the weight of authority in New York, and is not as well reasoned as the *Garriga* case.

authority, holding that criticism of mere opinion or theory is actionable defamation"); *Donaghue* v. *Gaffy*, 54 Conn. 257 (not libelous *per se* to write that plaintiff's actions stemmed from "selfish meanness"); *Hanaw* v. *Jackson Patriot Co.*, 98 Mich. 506 (or to accuse plaintiff of having played a "dirty, Jew trick"); *Sullivan* v. *Warner Bros. Theatres, Inc.*, 42 Cal. App. (2d) 660 (or to accuse plaintiff of "disloyalty" to his neighborhood); *Settlage* v. *Kampf, supra* (or to charge a man with advocating "false doctrines in theology or politics"); *Gough* v. *Goldsmith*, 44 Wis. 262 (or to write of a Catholic that he "is no longer a Catholic"); *Shaw* v. *Crandon Printing Co., supra* (or to charge a man with "standing as an obstacle in the path of municipal progress and with being a reactionary"); *Strickland* v. *Bonnici*, 78 Sol. J. 820 (P. C.) (*semble*: not libelous *per se* to accuse a bishop of "stupid and unwarranted attacks" on the "tenets of faith"); see also, *Peck* v. *Coos Bay Times Pub. Co., supra; Mayrant* v. *Richardson, supra.*

Probably the most notable decision of the kind, squarely in point here, is that of Mr. Justice (then Chief Judge) Holmes in *Fay* v. *Harrington*, 176 Mass. 270, holding that it was not libelous *per se* to write of a theatre owner that he discriminated unfairly against the Irish.[12]

The "state of mind" or "opinion" rule is a necesary complement of the doctrine, well settled in New York (but also ignored by the majority below), that there is no remedy, civil or criminal, for calumnies directed against *large segments of the community such as racial groups or*

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[12] In holding in the *Fay* case (1900) that the charge was not libelous *per se*, the Justice remarked that "It cannot be said that such a charge necessarily and in all populations would be hurtful in its effect upon a man's business" (p. 271). This is to be contrasted with the Justice's *aperçu* in a more ordinary libel case, *Peck* v. *Tribune Co.*, 214 U. S. 185, 190 (1909) (influenced by "privacy" considerations; not concerned with "state of mind" on a public question nor involving a public official), that the question of libel was not necessarily one of "a majority vote."

religious denominations. The pertinent authorities were recently analyzed in *People* v. *Edmondson,* 168 Misc. 142 (Gen. Sess.); see *Ryckman* v. *Delavan,* 25 Wend. (N. Y.) 186, 198; *Sumner* v. *Buel,* 12 Johns. (N. Y.) 475; *Weston* v. *Commercial Adv. Assn.,* 184 N. Y. 479, 483; Note, 97 A. L. R. 281. The immunity thus attaching to so-called "group libels" (*e. g.,* charges that Negroes are syphilitic, that Catholics are traitors, or that Jews are ritual-murderers) rationally calls for a large latitude in permitting characterizations of the state of mind of persons who may be conceived to have assumed one posture or another in respect to groups in the community (*e. g.,* characterizations as "anti-Negro" or "anti-Catholic" or "anti-Semitic"). Such imputations may indeed on occasion overshoot their marks; but again the existence in New York of the action for special damages is conceived to work a rough balance of justice.

We submit that separately or in combination the two rules considered in this Point are dispositive of the case in petitioner's favor.

POINT II

Underlying principles and policies of local law are likewise dispositive of the case in petitioner's favor.

Having virtually ignored the cases and rules of law most closely in point, the majority below believed the question at bar was doubtful (R. 30). It therefore resorted to an argument of policy—the touchstone of decision where the cases are not themselves determinative.

Our Point I has shown that the question was not at all doubtful. But we now propose to show that the majority's argument of policy is intrinsically insufficient, and that underlying conceptions of local law (and of law prevailing generally), operating upon all the circumstances at bar, would compel a holding in petitioner's favor even in the absence of those particular rules upon which we rely.[1]

(A) Applicable Principles

The only substantial appeal to policy made by the majority below was that, particularly in a community with a large Jewish population, the utterance at bar was likely to injure respondent (see at R. 30-31). That this consideration is not by any means controlling is at once indicated by the fact that many statements undoubtedly injurious are held not libelous *per se, e. g., Rose* v. *Daily Mirror, Inc.*, 284 N. Y. 335 (charging a person with being a close relative of a deceased murderer). Nor would it begin to explain why respondent was not remitted to an action for special damages, as in the view of the District Court and the dissenting Judge he should have been.

Plainly Judge CHASE's analysis is one-dimensional. It fails to take account of interests beyond that of respondent in his personal comfort.

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[1] We are again assuming *arguendo* that the publication charged respondent with racial prejudice in the matter of a political appointment.

The law of New York and the law prevailing generally recognize, and in the present case exalt, certain overriding societal interests.

1. The State whose courts and town halls once resounded to the cases of *Zenger* and *Crosswell*[2] has traditionally noted the close relation between actionable defamation and freedom of speech and the press—that whatever is added to the category of libel is in actuality withdrawn from the category of free debate. See *Marlin Fire Arms Co.* v. *Shields*, 171 N. Y. 384, 391; 2 KENT'S COMMENTARIES (13th Ed., 1884), p. 17. Significant libel cases present a collision between the individual's interest in personality and the broader interest in that freedom which is "the matrix, the indispensable condition, of nearly every other form of freedom" (*Palko* v. *Connecticut*, 302 U. S. 319, 327).

This consideration has in itself argued for caution in extending the area of actionable defamation. The caution is underlined and emphasized in the present case, for:

(a). The utterance concerns a public official.

It is the declared policy of New York that the area of permissible expression should be broader in the case of such a personage than in the case of a private citizen. Statements to this effect are uniform and multitudinous. "There should be publicity commensurate with the interest of the public in public affairs. And the policy of the law is that the public should at all times be informed of the acts of its servants and the considerations to be applied in determining whether or not the public welfare is being served, in order that it may be at all times aroused and alert to its just and essential part in the administration of government." *Tanzer* v. *Crowley Pub. Corp.*, 240 App. Div. 203, 205-6; see *Hoeppner* v. *Dunkirk Printing Co.*, 227 App. Div. 130, 133-4, *aff'd*, 254 N. Y. 95; *Cortright* v.

[2] 17 How. St. Tr. 675; 3 Johns. Cas. 337.

Anderson, 208 App. Div. 1, 3; *Howarth* v. *Barlow*, 113 App. Div. 510, 513; *Gardner* v. *Home Life Pub. Inc.*, 237 App. Div. 200, 202; *Hills* v. *Press Co.*, 122 Misc. 212, 215, *aff'd*, 214 App. Div. 752; *Duffy* v. *New York Evening Post Co.*, 109 App. Div. 471, 474-5; *Burnham* v. *Hornaday*, 130 Misc. 207, 215, *aff'd and mod.*, 223 App. Div. 218; *People* v. *Hebberd*, 96 Misc. 617, 637, 646.

(b). Apart from the type or character of the plaintiff in suit, the matter involved is one of public concern and the article deals with opinion or attitude thereon.

New York recognizes that the interest in such discussion is especially great, because this is the stuff out of which governmental policy is fashioned. It further recognizes that debate upon important public issues could hardly proceed if shorthand characterizations of opinion or attitude, carrying opprobrious implications in some quarters, could not be freely used. Mr. Justice Pecora of the State Supreme Court has properly said in this connection (*Garriga* v. *Richfield*, 174 Misc. 315, 320-1):

> "• • • Any rule to the contrary [*i. e.*, a holding that accusation of belief in Communism was libelous *per se*] would abridge that freedom of discussion relative to parties, principles and personalities in the political arena, which is so vital to the preservation of our democracy. To deprive our citizens of the right freely to debate political issues, or to allude to the political affiliations of others, is to make a breach in the dike which protects our cherished institutions. Far better it is to preserve that right unhampered—even with the abuses which frequently attend its exercise in the heat of political passion—than to limit it at the possible loss of our constitutional liberties. That right would be restricted at the expense of good government if, for instance, in a community where a political party had fallen into disrepute on account of evil practices, one could be held generally liable in damages to another for saying of him that he is affiliated with, or a member of, that party.

> "A further necessity for this rule is, that in many sections of the country—as is well known—a political party may be held in low esteem, because of prejudice, tradition or other equally unworthy reason, so that membership therein may expose one to contempt, hatred or ridicule; whereas in other sections the same political party may enjoy public favor and confidence. Should we, in the former situation, subject a person to liability for general damages for referring to another as a member of the despised party? The question itself echoes a negative answer."

2. Against this background of societal interest, respondent is contending not merely that the publication should be held actionable, but that it should be held libelous *per se*.

This is one of the harshest measures of liability known to the law. Generally speaking, the law of torts casts upon the injured party the burden of establishing the delict and proving the actual damage. When a statement is held libelous *per se*, however, the real and almost the entire burden of proof is cast upon the defendant, and the plaintiff may recover a judgment in almost any amount guessed by a jury without being required to allege or prove any actual damage. Thus the liability sought to be imposed is presumptive, and the penalty sought to be exacted is peculiarly grievous because incapable of even approximate admeasurement before the event.

These severities are pushed to the extreme in a case where the issue is whether a man does or does not have a certain state of mind or subscribe to a given belief or opinion. It is recognized that such an issue is especially difficult to resolve in a courtroom, and may in many cases lie altogether beyond the possibility of rational resolution. *Cf.* Brandeis, *J.*, *dissenting* in *Pierce* v. *United States*, 252 U. S. 239, 253; *Mayrant* v. *Richardson*, 1 N. & McC. (S. C.) 347, 350; *Snavely* v. *Booth*, 36 Del. 378. There is inherent difficulty in defining terms and thereby delimiting

the issues to be tried. For example, what precisely is meant by "prejudice" or "bias" or "Red" or "Fascist"? What degree of bias is conveyed by the expression "anti-Jewish" or "pro-Jewish," "anti-Polish" or "pro-Polish"? Is a charge of "indifference" to Jews or Poles a charge of prejudice in some degree? What percentage of hate or love makes one an "anti" or a "pro"? But, assuming a sound and practical definition of the opinion or belief which has been imputed, the question whether a man adheres to it would almost always involve a series of inferences from likes and dislikes, inclinations and disinclinations, affections and disaffections—a shadowland in which no one can assay the truth but the plaintiff, and sometimes not even he. This is, then, a situation in which extraordinary and presumptive liability for words has no proper place. See Judge CLARK's dissent, R. 33; *O'Connell* v. *Press Pub. Co.*, 214 N. Y. 352, 358.[3]

3. The law of libel takes account of the relative positions and capacities of plaintiff and defendant in the incessant battle of words. Thus the greater liberality allowed in discussion of acts and attitudes of public officials—a liberality characteristic of all common law jurisdictions—finds partial justification in the officials' readier resort to the press and other instruments of assault and defense, and their protected legal position in respect to their own official utterances (*supra*, pp. 14-15).

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[3] In the cited case, the court said: "It was not in and of itself libelous unless the language as a whole, considered in its ordinary meaning, naturally and proximately was so injurious to the plaintiff that the court will presume, without any proof, that his reputation or credit has been thereby impaired." Imputations of state of mind or opinion are inherently so vague and indefinite as to fall short of satisfying any such requirement. See the reference to the *O'Connell* policy in a case holding charges of "Fascism," etc., to be not libelous *per se*, *McAuliffe* v. *Local Union No.* 3, 29 N. Y. Supp. (2d) 963 (Sup. Ct.).

The law similarly takes account of the relative capacities of various types of utterances to get themselves heard. We have seen that "group libels" are not actionable in New York—a rule bottomed upon the public interest in full expression on matters of public concern.[4] The law thus suffers the bigots and merchants of hatred, and that they have taken advantage of this legal immunity is well known. But plainly the law grants this immunity only on the assumption that there shall be a great measure of freedom of reply and rebuttal. The decision under review would in practice destroy the right of reply, thus abandoning the field to the depredations of the bigots. Judge CLARK apprehended the danger inherent in the majority's decision when he said that with intolerance rife in the country, "we must not take the naive view that what ought to be is, and that whoever suggests the contrary is a slanderer; for if we do so, we shut off all healthy criticism of prejudice and allow bigotry full scope to act with impunity" (R. 32). The same danger was seemingly apprehended by the District Court when it spoke of the unhappy prevalence of racial and other intolerance (R. 21-22), which must be combatted by the free use of words.

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[4] In *People* v. *Edmondson*, 168 Misc. at 154, Judge WALLACE said in justification of the rule: "We must suffer the demagogue and the charlatan in order to make certain that we do not limit or restrain the honest commentator on public affairs." In *Ryckman* v. *Delavan*, 25 Wend. (N. Y.) at 199, Senator VERPLANCK said: "The principle upon which the civil remedy is allowed, does not apply here [a case of group libel]; and the great interests of society require that it should not be made to apply. It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party, or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals, or faith, should be checked by the dread of embittered and boundless litigation."

The foregoing will show that the majority imposed a maximum inhibition (2, *supra*) in a field where the interest of society demands a maximum of freedom (1 and 3, *supra*). This is the measure of the whole case.

(B) Current *Mores* an Index of Decision

The majority proceeds to its decision without any regard to whether the kinds of expression held by it to be libelous *per se* are commonly or rarely used in debate on public issues as carried on today.

Everyone knows that the kinds of expression so inhibited are in fact very commonly used in debate on public questions. Judge CLARK noted that the majority's rationale would "take in comments found day after day in the most conservative newspapers" (R. 32). In the petition for rehearing a random collection of statements was culled from current issues of newspapers and magazines, each one of which would be libelous *per se* under the rule announced below; we have added another sampling in the Appendix to this brief (*infra*, p. 49 ff.). We suggest that no issue of any newspaper, even the most dignified and cautious, is free of such statements: people are constantly being charged with entertaining unpopular views—this is one of the most familiar techniques of public argument.

What inferences should the majority have drawn from these homely facts? It should have inferred, first, that the law declared by it was at least "new law," as stated by Judge CLARK, and was probably contrary to the existing law of the State—for it is not to be lightly assumed that common practice is against current law.

But common practice affords more than an empirical indication of what the law is. At least in the field of libel, it is a strong indication of what the law ought to be.

From the proposition that the law of libel is not designed, and should not be permitted measurably to inter-

fere with freedom of expression on matters of public concern, it follows that the courts will not and should not undertake to impose severe sanctions on the kinds of utterance on such matters which, at the time of decision, are known to be flowing in great numbers into the marketplace of thought. For courts have no better means of apprehending what latitude is practically needed for the healthful exercise of the right of free speech than to observe what latitude is being availed of, currently, by writers and publishers. This reference to popular *mores* has shaped the law of libel from the beginning, and has accounted in part for its gradual transformation. By keeping its ear to the ground in this fashion, the law does not abandon its claim to assert itself as a moral force; on the contrary, it yields to widespread public habits of expression precisely because that is a means toward preserving freedom of speech, which the law chooses to consider a high moral good.

The decision under review abruptly encumbers and embarrasses with a threat of presumptive liability an enormous area of active expression on matters of general concern. The least that may be said is that respect for freedom of speech should have inclined the court against such a holding unless it was required by the unmistakable imperative of State cases and State policy. By no stretch of the imagination can it be said that such is the condition of State law or State policy.

POINT III

The decision under review is repugnant to constitutional guarantees and should accordingly be reversed irrespective of the condition of State decisional law.

(A) Practical Effect of Decision Below

We have seen that the "new law" created by the Circuit Court of Appeals would render presumptively actionable the imputation to a public official of any belief on a public matter, provided only the belief strikes the court as one which some respectable people would regard with distaste. While the court has not excluded the defense of truth (or the substantially equivalent defense of fair comment on facts truly stated), it is plain that the nature of the prohibited utterances is such that they would not be capable of legal proof in at least many instances, and that in very many if not in all instances proof of truth under common law rules of evidence would be difficult in the extreme (pp. 26-27, *supra*).[1] But if the defendant could not prove his statement by legal evidence to the satisfaction of both the court and a jury, the public official would become entitled to damages even if he had suffered no actual injury, and damages in such punitive amount as a jury might see fit to assess.

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[1] Judge CLARK said: "I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, as the *Tanzer* case suggests, and hence not a matter of explicit proof or disproof. The public official will always regard himself as not bigoted, and will so testify, sincerely enough. And then the burden of proving the truth of the defense will rest upon the commentator, who must sustain the burden of showing his inference true. If he fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established" (R. 33).

What the decision thus means in practical effect is that comment on matters of public interest and particularly on public officials is now—of all times in American history—to become a dangerous thing. The rule is one of "caveat commentator." To impute to an official an unpopular opinion or belief—unpopular in any given community—would expose the commentator to the "sporting element" of jury trials and punitive liability. Americans have not yet reached the beatific state in which argument can proceed without invective, and words have potentiality for fast travel and wide dissemination. What belief on any acute political or social problem is not today viewed with distaste in some communities in the United States? Shall such words as "appeaser," "pacifist," "warmonger," "fellow traveller," "Red," "Bolshevik," "Nazi-sympathizer," "Negro-hater," "Negro-lover," "Jew-hater," "Jew-lover," "pro-union," "anti-union," "Papist," "anti-Papist," "Know-Nothing," "anti-Know Nothing," "Fundamentalist," "anti-Fundamentalist," "radical," "reactionary," and the thousands of other characterizations that have filled and now fill our daily press in all sections of the country, be eliminated from the vocabulary of the polemicist or used only at the risk of reprisal in the courts—and that by public officials who themselves enjoy extraordinary immunities for their own often equally intemperate utterances, and ready access to means of self-defense (including, in the case of a Congressman, the government-subsidized franking privilege)?

The right to criticize our rulers distinguishes our way of life from that of the dictatorships; it is our major corrective and without it the democratic mode is impossible. We submit that the decision below so far limits and restricts that right as to offend against constitutional guarantees.

(B) Freedom of the Press and Due Process of Law

A State statute, embodying *in haec verba* the rule of the case as declared by the Circuit Court of Appeals, would, we think, be invalid under the free press, and both the "property" and "liberty" features of the due process clauses, of the State and Federal Constitutions.

1. These guarantees bespeak more than a prohibition of "previous restraints"; a statute imposing subsequent punishment which has the effect of trammelling or embarrassing unduly the expression of views on matters of public interest is likewise unconstitutional. *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296, 307. And it can make no constitutional difference that the penalty in question is imposed through processes denominated civil rather than criminal. *Cf. Near* v. *Minnesota,* 283 U. S. 697. For in respect to the seriousness of the threat to free expression, the restrictive effect on the communication of ideas, and the penalty in prospect or actually imposed, civil liability is not less and may well be more grievous than liability for a fine. See Holmes, Collected Legal Papers, pp. 173-4. Be it noted that Congressman Sweeney asks damages of $250,000 in the present case (R. 5) and he instituted seventy-four other actions based on the same or substantially the same column.

2. A rule limiting expression is to be tested for constitutional purposes not only in the light of its impact on the particular state of facts arising for decision but "upon its face," that is, in the light of the generality of cases which may arise under it. Proof of an abuse of power in the particular case is not a requisite for attack on the validity of the rule, whether of previous restraint or subsequent punishment. *Thornhill* v. *Alabama, supra,* pp. 96-98; *Hague* v. *C. I. O.,* 307 U. S. 496, 516. It is thus appropriate to consider the enormous area of expression which becomes at least "hazardous" (R. 32) under the new rule of liability.

3. The essential vagueness of the rule adds immeasurably to the hazard and to the implicit restraint, and is a further index of invalidity. *Cantwell* v. *Connecticut, supra,* p. 308; *Bridges* v. *California,* ..... U. S. ....., ..., 86 L. Ed. 149, 152.[2]

4. In applying the constitutional provisions to the case at bar, the Court will recognize that they "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow" (*Bridges* v. *California, supra,* p. 153); that they were intended to prohibit restrictions "that cramp the feeling of freedom in the use of tongue or pen regardless of the temper or the truth of what may be uttered" (dissenting opinion, *id.,* p. 168). Above all it is vital to remember that here—as in few if any cases in which like constitutional questions have arisen—the "substantive evil" alleged to justify the restriction on utterance is not a possibility of disorder or breach of the peace or disruption of the courts, in which the State has a real and pressing interest; it is merely the possibility of an intrusion on personal comfort —against which is ranged the interest of society in free debate on matters of public importance.

The relevance of these contentions is disputed by respondent on the ground that, as libels are traditionally punishable despite the free press and due process provisions, a holding that a class of statements is libelous can raise no fundamental question (Br. Opposing Cert. 17-19).

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[2] As Judge CLARK said, "And the making of fine distinctions in rationale is indicated by the implication that a comment suggesting plaintiff's objection to the judicial candidate for his foreign birth alone would have been proper. Of course, the uncertain threat of suit, invited by a rule at once so vague and so extensive, is a restriction on freedom of the press almost as direct as a rule of clear liability" (R. 32-33).

But if the reciprocal relation between libel and free speech is apprehended (*supra*, p. 24), it becomes clear that a situation may undoubtedly be met where expansion of the range of libel must be held unduly to restrict the permissible range of free speech; and the question is only one of where the line should be drawn. Indeed, much of the history of free speech in England and the United States is a history of successive limitations on the scope of criminal libel; and that this case involves an issue of civil libel is not a difference of "constitutional dimension."

Further, unless the nexus between libel and free speech is as we have described it, the decisions of this Court protecting the right of utterance may be rendered meaningless by manipulation of the law of libel. To cite one instance: Of what avail are the decisions of this Court safeguarding picketing as a constitutional right,[3] if a legend on a picket sign "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!"[4] may be held libelous *per se* as an imputation to the employer of anti-Negro prejudice, as under the decision at bar it would be? The Court should not, we submit, tolerate any such evasion of doctrine deliberately pronounced. See *United States* v. *Hutcheson*, 312 U. S. 219, 236.[5]

(C) Privileges and Immunities Clause of the Fourteenth Amendment

A further constitutional provision—the privileges and immunities clause of Section 1 of the Fourteenth Amendment—is pertinent here. The utterance involved related

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[3] *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 478; *Thornhill* v. *Alabama*, *supra*; *American Federation of Labor* v. *Swing*, 312 U. S. 321.

[4] See *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, 557.

[5] In *American Federation of Labor* v. *Swing*, *supra*, the State court granted its injunction, vacated by this Court, in part on the ground that the picketing had included the dissemination of libelous statements about the employer.

to a National legislator in a matter of National importance. That the discussion of National affairs is a right which must lie within the coverage of the privileges and immunities clause is clear from *Hague* v. *C. I. O., supra,* pp. 512, 522, 532. See *United States* v. *Cruikshank,* 92 U. S. 542, 552-3; *Edwards* v. *California,* 314 U. S. 160, 181. Mr. Justice BRANDEIS had said, *dissenting* in *Gilbert* v. *Minnesota,* 254 U. S. 325, 337-8:

> "The right to speak freely concerning functions of the Federal government is a privilege or immunity of every citizen of the United States, which, even before the adoption of the 14th Amendment, a state was powerless to curtail. It was held in *Crandall* v. *Nevada,* 6 Wall. 35, 44, that the United States has the power to call to the seat of government or elsewhere any citizen to aid it in the conduct of public affairs; that every citizen has the correlative right to go there or anywhere in the pursuit of public or private business; and that 'no power can exist in a state to obstruct this right which would not enable it to defeat the purpose for which the government was established.' The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of Federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it. Were this not so 'the right of the people to assemble for the purpose of petitioning Congress for a redress of grievance or for anything else connected with the powers or duties of the national government' would be a right totally without substance. See *United States* v. *Cruikshank,* 92 U. S. 542, 552; *Slaughter-House Cases,* 16 Wall. 36, 79."

It cannot be doubted, we think, that a State statute measurably interfering, through imposition of presumptive civil, or criminal liability, with the right to petition National officials for a redress of grievances, would be invalid under the privileges and immunities clause; as would a

State statute destroying the traditional immunity of National officials from prosecution or civil suit for libel based on their official utterances. The practice of petitioning for redress of grievances has fallen into disuse; in a modern world the equivalent is the newspaper editorial and the commentator's animadversion on National affairs. And the right of a National official to speak freely on public matters is not more important than, nor fundamentally different from the right of a private person to speak freely in criticism of the acts and attitudes of National officials. In this field the Constitution compels a National pattern of freedom beyond the inhibitions of State statute.[6]

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[6] The privileges and immunities secured by the clause are those of "citizens of the United States." Therefore it has been said that the benefits of the clause are confined to natural persons. *Hague* v. *C. I. O., supra,* p. 514. The same approach was taken, in the concurring opinion in the same case, to the coverage of the "liberty" phase of the due process clause. *Id.,* p. 527; and see *Western Turf Assn.* v. *Greenberg,* 204 U. S. 359, 363, where both problems are treated *in pari materia.* But from that part of *Bridges* v. *California, supra,* as to which the Court was in agreement, it appears that the "liberty" phase of the due process clause is now conceived to cover corporations; and a like position is foreshadowed under the privileges and immunities clause. The Court is doubtless conscious of the fact that newspapers and other great media of expression are predominantly owned by corporations; hence restrictive interpretation in either context would involve serious perils to a free press. Moreover, the rights involved, although asserted by a corporation-publisher, realistically include the rights of the author and especially of the reading public, who are natural persons and presumably for the most part American citizens; the corporation is merely a conduit. *Cf. Truax* v. *Raich,* 239 U. S. 33. A holding that a corporation is entitled to some at least of the privileges and immunities under Section 1 of the Fourteenth Amendment involves less conceptual difficulty than the doctrine that a corporation is a citizen within Article III, Section 2—originally evolved by way of a "presumption" that a corporation represented the persons composing it and that all those persons were citizens of the State which chartered the corporation. See *Barrow S. S. Co.* v. *Kane,* 170 U. S. 100, 106.

(D) Special Circumstances of the Present Case

What has been said exposes the constitutional infirmities of the rule of law under attack, even had that rule been embodied in State statute. But the constitutional infirmities are stressed and aggravated by the fact that the rule was (1) declared by a court and not a legislature, and (2) by a Federal court purporting to declare State law.

1. A judge-made rule of substance, like a statute, is an act of the State (or the Nation) within the ambit of the constitutional prohibitions; this doctrine has been evolved in the very field of free speech. *American Fed. of Labor* v. *Swing*, 312 U. S. 321. Moreover, it has been forcefully pointed out that a judge-made rule intrinsically involves greater hazards to the constitutional guarantees than a statutory rule, because defined with less precision. *Cantwell* v. *Connecticut, supra*, p. 308. And this Court has rightly accorded less weight to judicial declarations of policy inhibiting free speech than to legislative declarations of policy looking in the same direction. The language of Mr. Justice BLACK in *Bridges* v. *California, supra*, p. 152 (to which, we take it, the minority of the Court would not take exception), is directly pertinent here:

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, 308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' But as we also said there, the problem is different where 'the judgment is based on a common law concept of the most general and undefined nature.' *Id.* 308. *Cf. Herndon* v. *Lowry*, 301 U. S. 242, 261-264. For here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind

of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that 'it must necessarily be found, as an original question' that the specified publications involved created 'such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection.' *Gitlow* v. *New York*, 268 U. S. 652, 671."

2. In the case at bar the rule of law is not even encased in the less-than-armor of deliberate consideration by a State court. It is the judgment of a Federal court, not responsive to the will of the people of the State, purporting to apply State law, but in fact creating new doctrine on the insecure basis of general definitions. We have, therefore, no true judgment of any agency of the State that the inhibitions of the rule are needed to subserve any interest which the State thinks it necessary or wise to protect. On the contrary, we have shown above by reference to decisions of the State courts that their views of policy are quite different from those apparently entertained by a majority of the Circuit Court of Appeals.[7]

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[7] It is proper to add that whereas it is one of the vices of the rule declared by the court below that it is vague and therefore indefinitely extensible, this Court's reversal on constitutional grounds need not imply an indefinite limitation on the power of the States. The Court's ruling may for the present be confined to a denial of the power of the States to impose (a) the sanction of presumptive liability upon a statement concerning (b) an official, or, alternatively, a National official, which imputes to him (c) a state of mind or opinion on (d) a matter of public importance.

POINT IV

The publication at bar, properly interpreted, does not accuse respondent of racial or religious intolerance, and is therefore not libelous *per se* on any theory.

We have thus far assumed, with the court below, that the article is to be interpreted as charging respondent with intolerance of Jews or foreign-born Jews. We now urge that properly interpreted the article does not charge such intolerance.

If the statement in the article to the effect that respondent was associated with Father Coughlin is shorn of an invidious implication which the court was not authorized to make (see *infra*), the article amounts merely to an assertion that the Congressman was publicly (not stealthily) urging the race, religion and/or foreign birth of a particular person, Freed, as reason for his being denied the endorsement of Ohio Representatives for appointment to a particular office, that of District Judge. From this it could be inferred, at most, that the Congressman was of the opinion that the race, religion or foreign birth of candidates should have a bearing, or in given cases a conclusive bearing, upon their selection by the President for service on the bench. It cannot be seriously suggested that to impute such a belief to a Congressman is libelous *per se*. For such a belief finds justification in respectable ideas widely held and commonly acted upon; the idea, for example, that judicial personnel should in some sort reflect the numerical or voting strength of the various racial, religious or social (as well as political and geographical) sectors of the community, or, put another way, that it is not sound policy for any one of such sectors to obtain disproportionate representation on the bench. (Jews have not infrequently opposed Jews for judicial and other public offices on precisely these grounds.)

At least two errors—one an obvious error of law, the other an error of misdirected compassion toward minority groups—appear to account for the court's failure to adopt the interpretation of the article just presented.

1. The error of law lies in the court's assumption, apparently as a matter of judicial notice, that Father Coughlin is an anti-Semite, from which it proceeded to infer that the statement that respondent was "chief congressional spokesman of Father Coughlin" (paragraph 3 of publication, R. 3) was in effect a charge of anti-Semitism.[1] Thus Judge CHASE said, "The false statements published concerning him [respondent] neither separately nor together make him out to be a character more offensive to right-thinking people than he would be as the spokesman in Congress of Father Coughlin; who opposed the appointment of a man named Freed," etc. (R. 29).

It was, of course, altogether improper for the court to make any such assumption as to Father Coughlin. If it was respondent's position that the charge of association with Father Coughlin was implicitly a charge of anti-Semitism because Father Coughlin is an anti-Semite, he should have pleaded this matter in his complaint as an "extrinsic fact," in which case it is established under New York law that he would also have been compelled to plead special damages, which he did not do. *O'Connell* v. *Press Pub. Co.*, 214 N. Y. 352; *Crashley* v. *Press Pub. Co.*, 179 N. Y. 27; *McNamara* v. *Goldan*, 194 N. Y. 315, 321.

It is noteworthy that in the only other reasoned opinions holding for respondent on motions to dismiss, *viz.*, the two opinions by Judge HOLLY in the District Court for Northern Illinois, Eastern Division, the same erroneous

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[1] Judge ALLRED in *Sweeney* v. *Caller-Times Pub. Co.*, 41 F. Supp. 163, 166, refusing to follow the decision of the Circuit Court of Appeals herein, said that that court "seemingly regarded as most libelous the statement that Sweeney was the spokesman in Congress of Father Coughlin * * *."

assumption was made. Judge HOLLY referred to Father Coughlin as a "bitter and vicious" anti-Semite (*Sweeney* v. *Joliet Printing Co.*, No. 1204), and again as "a demagogue who is stirring up racial and religious antagonisms" (*Sweeney* v. *Illinois Pub. & Print. Co.*, No. 1201).[2]

2. What we have, with all deference to the court, called an error of misdirected compassion, appears also to have contributed to the court's leap from the statement that respondent opposed Freed for public office because he was a Jew or a foreign-born Jew, to the superimposed interpretation that respondent was charged with being intolerant of the whole class of Jews or foreign-born Jews. Although, under the rationale of the decision below, it would now be equally libelous to say of respondent that he opposed Freed for office because he was a Yankee, a Southerner, or of English extraction, it is hardly likely that, had such a case been first presented to the court, it would have been as quick to infer that the statement betokened prejudice against the whole class of Yankees, Southerners or persons of English extraction; the court would probably have inferred that respondent was simply advancing a conventional political argument against a particular political appointment. What is the distinction between the case at bar and the hypothetical case? The distinction is that Jews are a small minority, while the other classes have considerable numerical strength. But in the context of the present case this distinction is emotional, not rational. Rationally considered, an implica-

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[2] The majority made a further mistake in analysis. Even if a charge of opposition to Freed could be construed as a charge of prejudice, it was certainly no more than a charge of prejudice on one occasion. Recognizing that no human being is exempt from a sporadic lapse of judgment or of diligence or care, the courts of New York have held that a charge of a single misstep or a single neglect of duty is rarely if ever libelous *per se*. *Twiggar* v. *Ossining Print. & Pub. Co.*, 161 App. Div. 718; *Church* v. *Tribune Assn.*, 135 App. Div. 30.

tion of prejudice against a large class may well carry a greater potentiality of libel than an implication of prejudice against a small class, since the hurt to the plaintiff is presumably greater. On the emotional side, however, the latter case makes a stronger, albeit a deceptive, appeal to the court. The majority apparently supposed that, by being quick to infer anti-Semitism from statements in themselves innocuous, and then branding anti-Semitism as so horrendous that a charge thereof must be held libelous *per se*, it was assisting a weak minority. But we have shown that, far from assisting weak minorities, the decision below deals an especially hard blow at them by rendering criticism of bigots and bigotry at least "hazardous" (*supra*, p. 28; R. 32-33).

Other courts which have been called upon to examine the question have refused to fall into the errors above noted.

They have recognized, first, that opposition to particular candidates for office on the ground of nationality, race, religion and the like is not inherently so unreasonable as to point to prejudice; second, that, whether or not unreasonable, it is in fact so common that to brand a charge thereof as libelous *per se* would be but an unreal gesture.

We venture to say that there are few people who have not given consideration to factors of race, religion, etc., in the matter of political appointments, without thereby exhibiting prejudice or at any rate more than the touch of prejudice that is ineradicable from even the best of human minds. The notion that merit alone should dictate political appointments and that anyone who thinks otherwise on any particular occasion is a prejudiced rascal, is, indeed, neatly contradicted by a review of the qualifications which Congress has itself established by statute through the years for the holding of various Federal offices. Some of the pertinent statutes are brought together in the dissenting opinion of Mr. Justice Brandeis in *Myers* v. *United States*, 272 U. S. 52, 240.

Attention has already been directed to the opinion of the District Court, where these considerations are touched upon (R. 15, 21-22).

Chief Justice GREEN said in *Sweeney* v. *Newspaper Printing Corp.*, 177 Tenn. 196, 199-200:

> "The language printed indicates that plaintiff's opposition to Mr. Freed's appointment to the bench was based not only on the fact that Freed was a Jew but because he was born in Hungary, did not come to the United States until he was thirteen years old, and was not naturalized until ten years later.
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> "It does not seem to us that the opposition of a Congressman to the selection of a Federal District Judge on either of these grounds necessarily reflects on the personal, professional, or official character of that Congressman.
>
> "A member of the House of Representatives has no part in the selection of a federal judge, either by way of appointment or confirmation. The most that he can do is to recommend. It appears that the plaintiff is a Democrat. If for reasons purely political he opposed the appointment of a foreign-born citizen, or a Jew, or a Catholic, or a Protestant to the federal bench, such action would not indicate personal, professional, or official delinquency.
>
> "It has always been customary, so far as we know, for the President himself, who appoints the judges, all applicants being qualified, to be influenced by the political effect of the particular selection he makes. Under such circumstances, we have heard of no criticism of any President on this account. Naturally interpreted, at most, the charge here is that for political reasons plaintiff opposed the appointment of a particular man as federal judge, on account of the religion or nativity of that man. We are unable to see that the charge could be regarded as libelous *per se*, there being other qualified applicants for the office.
>
> "The plaintiff, without any vestige of personal race or religious prejudice, might have opposed the appointment of Mr. Freed to the federal bench as a matter of party policy. Such action on his part would

not be reprehensible in a government ruled by political parties, other capable men being available for the position."

And similarly the Ohio Court of Appeals said in *Sweeney* v. *The Beacon Journal Pub. Co.*, 66 Ohio App. 475, 480-1, *app. dism.*, 138 Ohio St. 330:

"It does not seem to us that the opposition of a congressman to the appointment of a person to high public office by the President of the United States for the reason that he is a foreign-born Jew constitutes a violation of the moral code or the laws of the land. Nor does it seem that if a congressman acts as a spokesman for a priest in the Catholic Church he is guilty of such delinquencies.

"If the plaintiff's claims can be sustained, then it can be said of the framers of the Constitution of the United States that they violated the moral code when they advocated the enactment of Article II, Section 1, of the Constitution of the United States, which provides in part that 'No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President' of the United States; or of Article I, Sections 2 and 3, of the Constitution, which in part provide that no person shall be a representative to Congress who has not been for seven years a citizen of the United States, nor a senator unless he has been a citizen for nine years.

"It is common knowledge that political appointments are greatly influenced by the political effect of the appointments. And it is common practice to appoint, to various offices, persons who are representative of different nationalities, creeds and groups. To oppose a person for political reasons because he is a Methodist, a Baptist, a Catholic, a Jew, or one foreign born, for a particular appointment, does not carry the necessary implication that the person opposing is influenced by his own intolerance, any more so than does opposition to a qualified person because he is of some other political party, or is in the declining years of his life, or favors prohibition, or is of

socialistic tendencies or has had capitalistic connections. It might be said under these circumstances that the person charged with such utterances was deprived of the 'respect, confidence and esteem' of the thousands of honest citizens who come within such classification."

POINT V

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court reinstated.

There is no question in the case of which general body of law is applicable. All the judges who acted in the matter below recognized that the decisional law of New York was applicable and they all sought to find and apply that law. This Court has before it two contrary findings of State law—that of the dissenting judge in the Circuit Court of Appeals confirming the analysis made by the District Court, and that of the majority of the Circuit Court of Appeals. On an objective showing that the former finding is correct and the latter incorrect, this Court should reinstate the judgment of the District Court.

Contrasting methodologies in finding State law are also fully exposed in the opinions below and call for final choice by this Court.

1. The majority purported to follow authority in the New York Court of Appeals but, as we have seen, it merely rehearsed a form of words contained in those cases which affords scant if any guide to actual decision. The true effect of the holdings of cases in the Court of Appeals as well as in the lower courts, marking out the particularly pertinent rules, was disregarded by the majority but observed by the District Court and the dissenting Judge. Of course the Rules of Decision Act requires that

greater weight should attach to the holdings of State cases than to mere language in opinions having at most the authority of *dicta*.[1] Compare the technique employed by this Court in finding State law in, *e. g.*, *Texarkana* v. *Arkansas L. Gas. Co.*, 306 U. S. 188.

2. While citing cases in the Court of Appeals, the majority thought it doubtful whether the publication at bar was libelous *per se* within those authorities (R. 30). If it believed that the highest court of the State had not conclusively settled the question, the Federal court was bound to look to pertinent decisions of the lower State courts. *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464; *Six Companies* v. *Joint Highway Dist.*, 311 U. S. 180; *Fidelity Union T. Co.* v. *Field*, 311 U. S. 169; see *Russell* v. *Todd*, 309 U. S. 280, 293. This the majority failed to do. The dissenting judge and the District Court, on the other hand, accorded weight to the decisions of lower courts in combination with authority in the highest State court.

3. If the particular decisions were not dispositive, the majority should have sought the solution of the problem in the basic principles and policies underlying the law of libel in New York and the law of libel prevailing generally. There is obviously no escape from the obligation to consider such fundamentals unless the search for State law under the Rules of Decision Act is to become a sterile exercise possibly more objectionable than the practice overturned in *Erie Railroad Co.* v. *Tompkins*. In the same connection we point to the majority's failure to give due weight to provisions of either the State or Federal constitutions even as significant indications of policy. On the other hand, the District Court and the dissenting Judge exhibited a clear appreciation of such underlying conceptions.

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[1] *Cf.* Corbin, *The Laws of the Several States* (1941) 50 Yale L. J. 762.

As the judgment of the District Court represents the law of New York as it must be, and has actually been found to obtain by pursuit of a proper methodology under the Rules of Decision Act, it should be reinstated.

With equal force we urge that irrespective of the decisional law of New York, the judgment of the District Court should be reinstated as the only one compatible with constitutional standards.

Respectfully submitted,

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Appendix

Judge CLARK observed that the press of the day abounds with statements which would be held libelous *per se* under the rationale of the decision below (R. 32).

Following are some statements culled from New York City newspapers of a single day selected at random, Monday, February 9, 1942:

"This opposition is not even Republican. It is an opposition that plans to use the Republican machinery. There are many party Democrats in it, and there are Fascist circles behind it. It has a press—the Hearst, McCormick, Patterson (Daily News) press. It has pamphlets and minor papers that reach the rabble; Social Justice, Roll Call, news letters, and innumerable other means of spreading pro-Fascist propaganda. It has a plan: To secure the re-election of the kill-Roosevelt crowd and of all the isolationists. It intends to create a solid and active minority whose purpose will be to paralyze all action and to use every internal confusion and external defeat to render the country incapable of an active pursuit of the war . . . and prevent a United Nations conduct of the war, by demanding an exclusively American control of the war, which seems to be very patriotic, but would be disastrous. And they wish this American control in order to control the disposition of the United Nations armed forces."

Post, p. 9

"Chairman Flynn of the Democratic National Committee has interpreted and distorted national unity in war to mean suppression of political opposition. . . .

"It is to be wondered if Mr. Flynn is seeking national unity, or PERPETUATION OF POWER."

Journal-American, p. 12

"'You know the law department [of the City] has refused to use a No. 2 candidate on the [civil service] list because he was a Negro,' Kern charged further."

World Telegram, p. 7

"Last Fall U. S. officials in these countries informed the department that Nazi agents were distributing pro-Jap pamphlets in English and native languages, evidently written by an American. A

check-up disclosed, it is charged, that the writer was Ralph Townsend, an editor of Scribner's Commentator."

Daily Mirror, p. 19

"According to testimony which will be presented, Frederick V. Williams, Pacific coast newspaperman, not only was the correspondent of the Japanese Times and Mail of Tokio, but also was making pro-Jap speeches before many organizations."

Daily Mirror, p. 19

". . . Ben Hecht, the drama critic-hater. . . ."

Daily News, p. 28

"Lescohier was the [radio] program's No. 1 labor baiter."

PM, p. 24

"WHEELER'S STILL AN ISOLATIONIST."

PM, p. 13

And following are statements taken from an issue of *The Nation* (February 14, 1942) and an issue of the *New Republic* (February 16, 1942):

". . . R. J. Thomas, president of the United Automobile Workers, placed the blame for the delay in shifting to all-out war production primarily upon the shoulders of Knudsen, who he declared has represented the automobile industry and not the people of the country in his service at Washington. . . . the isolationist press, which consists mainly of newspapers owned by William Randolph Hearst, Joseph M. Patterson, and Robert R. McCormick. . ."

"The Shape of Things," *The Nation*, p. 182.

"But in the case of Jesse Jones, personality is closely integrated with policy. The kind of a man he is explains . . . why his policies have been sterile in peace time, ruinous in war time. . . . His scorn for theorists, intellectuals, and such odd fish is huge. . . . he combines provincial small-town conservatism with a dislike for 'Wall Street.' . . . Jones can be depended on to stand firm with the Street on any crucial issue. . . .

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"The fourth base of Jesse Jones's power is his control of the RFC. In his nine years as chairman he has built a bureaucratic hierarchy which has no parallel in Washington. . . . It has been years since Jones has bothered to attend an RFC board meeting; he knows there will be no shadow of disagreement since he has decided everything in advance himself. Jones took care to see that the recalcitrant Emil Schram's successor as RFC chairman was a sixty-eight-year old Democratic politician named Charles B. Henderson, who gives the impression he will stand without hitching. . . .

"Throughout these articles I have called Jones a 'state-capitalist,' . . . What we see in the RFC is a combination of the vices of private capitalism and state bureaucracy. . . . The RFC and the other government corporations under Jones's control have been run in the most bureaucratic and dictatorial manner, and their policies have had the effect of strengthening all that is undemocratic in our economic system. A shift of power toward state capitalism of this kind cannot be called an advance toward democracy. It is true that Jones himself is a conservative and not a potential fascist. But his policies, by blocking the road to any democratic solution of our social and economic war problems, are making straight the path of some future native totalitarian movement."

"Jesse Jones, Reluctant Dragon," *The Nation*, p. 190

"THE NAZI BUND of New Hyde Park, Long Island, a center of pro-fascist and Coughlinite activity, has become the New York Park Fishing and Hunting Club."

"In the Wind," *The Nation*, p. 193

"Third, his treatment of the reaction of the Negro to slavery should destroy forever the prejudiced belief, which was given scientific authority by Sir Harry Johnston, that the Negro, having been fitted by nature for slavery, offered no resistance to enslavement."

Book Review, *The Nation*, p. 196

"Nor is Jim Crow a strictly Southern proposition. New York City maintains four public colleges. . . . No faculty member is a Negro. . . ."

New Republic, p. 221

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"John Tabor, that arch-reactionary, will take over the Appropriations Committee and use it to drive all liberals out of leading positions in the government agencies. The chairman of the Banking and Currency Committee will be Jesse Wolcott, the leader of the fight to emasculate the price bill. Allen Treadway will run the Ways and Means Committee, taxing the poor and letting the rich go free. The Foreign Affairs Committee, with powers of control over Lease-Lend and Reconstruction, will fall into the outstretched hands of Hamilton Fish. To Fish will also go the Rules Committee, to become the burial ground of all liberal measures.

New Republic, p. 226

"The Sinarchist movement is a Mexican version of the Christian Front. The top man in the movement at present is Salvador Abascal, now organizing the Sinarchist colonizing project in Lower California. Preaching the destruction of democracy, his avowed ideal is a return to the conditions of the thirteenth century. The favorite attack of his newspaper on Cardenas berated the latter's 'Jewish-Masonic convictions.' To Abascal and to his movement even the Church in the United States gives comfort. The Rev. Jerome P. Holland writing in The Tablet, the organ of the Brooklyn diocese (November 8, 1941), assured American Catholics that the Sinarchist movement 'may be described as a movement of the Right, deeply rooted in Catholic spirituality and philosophy, recognizing the evils from which modern society is suffering and proposing practical remedies . . .'

"The remedy, of course, is fascism, preferably clerical; but the important fact to note here is the open support of a movement dedicated to the destruction of democracy and hatred for the United States. Further support for Sinarchism has come from the News Service of the National Catholic Welfare Conference (a voice of the American hierarchy) and from the influential Jesuit weekly in El Paso, Texas, Revista Catolica.

". . . one of the signers was Father Joseph F. Thorning. These demands have already reached our State Department. Needless to say, any surrender on this point could only be construed as a new kind of appeasement—the appeasement of clerical fascism."

New Republic, pp. 232-233

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"Under the vacillating leadership of Representative Joe Martin of Massachusetts, the Republicans employed their power to obstruct the President's foreign and domestic policies but seldom with sufficient effect to dramatize their opposition. By allying themselves with reactionary Southern Democrats, Republicans beat the President repeatedly on domestic issues. . . .

"There should be a reasonably good chance of cutting off the isolationist limbs on which the war found many members of Congress. To cite an extreme example: how can Representative Hamilton Fish hope to be reelected in the President's home district now that a grand jury has exposed his involvement in the Viereck Verein and his voting record bears public witness to his obstructionism before December 7, and after?"

New Republic, p. 235

Characterizations such as reactionary, radical, pro-Nazi, anti-democratic, Fascist, anti-Catholic, anti-Semitic, anti-Negro, appeaser, isolationist are so common that the most casual survey of almost any segment of the press will turn up thousands of examples. Following is a sampling:

"One of Miss Ingall's letters was to her friend, Catherine Curtis, president of the Women's Executive Committee of America, Inc., a well-known Washington lobbyist for reactionary causes."

World-Telegram, February 12, 1942, p. 10

"Nazi Leaning Laid to Fish"

Post, February 10, 1942, p. 5

"For years most of the general public has watched Mr. Lewis with suspicion and fear. He has been credited with a ruthless appetite for personal power over labor, industry and government. He has been accused of dictatorial acts and ambitions."

World-Telegram, January 26, 1942, p. 12

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"To the Editor of the Sun—Sir: Joseph P. Lash, the much discussed radical leader of the youth movement, . . ."

N. Y. Sun, January 26, 1942, p. 16

"JAIL MUZZLES FASCIST PELLEY FOR 2 YEARS"

Post, January 21, 1942, p. 5

"LEWIS UNITY PLAN HELD ISOLATIONIST PLOT.

"The double-talk that has characterized the tremulous relationship between him and other CIO officials will be dropped, and his 'peace plan' will be described for what it appears to be, a sell-out by men who can spell 'accouplement,' but who can neither spell, pronounce or understand the meaning of the word 'democracy.'"

Post, January 21, 1942, p. 5

"Nominally Hart is the president of the New York Economic Council, a reactionary business lobby which has fought social reform for two decades . . . Allen Zoll, who at that time led American Patriots, Inc., a Fascist dummy corporation . . . and while *America's* anti-Semitism has been less pronounced than the other Coughlin organs, it has steadily upheld Coughlin in his clashes with critics . . . John B. Trevor, millionaire 'patrioteer' who has been connected with half a dozen pro-Fascist units; John B. Snow, who uses a front called the 'League for Constitutional Government.'"

PM, June 12, 1941, p. 14

"The leaders of the pro-Fascist front have groped for a leader who could unite Coughlinites and professional anti-Catholics, Bundsmen and phony patrioteers, society women and street rowdies. They now believe they have found their man.

"He is Charles A. Lindbergh . . . At a conference attended by George Deatherage, James True, Gen. Van Horn Mosely and other avowed pro-Fascist leaders in 1940, . . . Social Justice has editorially embraced him; so have anti-Catholic tub thumpers like Edward Smythe."

PM, June 12, 1941, p. 21

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"Father Edward F. Brophy, spiritual adviser of the anti-Semitic, pro-Fascist Christian Front, ducked a debate yesterday because he said the sponsoring group 'Is so pro-British, so pro-Communistic, in being anti-Nazi but not anti-Marxist.' . . . This is the same Father Brophy who has been heard at Joe McWilliams' Jew-baiting meetings and who declared at a Christian Front meeting last July that the Declaration of Independence was 'a Christian document, intended for Christians only.' "

PM, April 28, 1941, p. 5

"Senator Burton K. Wheeler, the appeaser, says he probably will be called an appeaser but he thinks the time has come for a negotiated peace."

PM, April 21, 1941, p. 10

"For Colonel McCormick at 61 may be the least popular U. S. publisher, as well as the most arrogant, contentious and unpredictable . . . That poll reflected the Tribune's savage anti-Roosevelt angling of news. Meantime its isolationist-propaganda-as-news-unsurpassed for furious bias since frontier journalism. . . ."

Time, December 1, 1941, p. 62

"Already the newsstands blossom out with pictures, in various types of ecclesiastical garb and pose, of the fatuously pro-Soviet Very Rev. Dr. Hewlett Johnson, Dean of Canterbury."

"Issues that are Involved in American War Aid to Russia," *America*, September 20, 1941, p. 650

"Catholic diplomat John Cudahy recently blossomed forth as mouthpiece for the Fuehrer."

The Converted Catholic, September 1941, p. 191

"In 1916 Georgia was the most anti-Catholic state in the Union, thanks to Catholic baiter Thomas Watson's attacks."

Time, September 22, 1941, p. 50

"As an American, I can have no part with Lindbergh's anti-Semitism. Allow that cancer of Anti-Jewry to grow, and our country will be destroyed."

"Lindbergh and The Jews," *Liberty Magazine*, January 3, 1941

Appendix

"Joseph P. Kamp, head of the so-called Constitutional Educational League, has written a second booklet exposing the 'Fifth Column' entitled the 'Fifth Column in the South.' It follows the usual Kamp pattern, being generally anti-labor and anti-democratic. But where his first book was anti-Semitic, this is Anti-Negro."

"Democracy and Authoritarianism," *The Protestant Digest,* December - January, 1940 - 1941, p. 44

Following are some suggestive editorial reactions to a single episode, the speech delivered by Charles A. Lindbergh in Des Moines, Iowa, September 11, 1941:

"On Thursday night at Des Moines Mr. Charles A. Lindbergh departed from the American way. For all his circumlocutions, for all his tardy admission that the Nazis' treatment of the Jews could not be condoned, Mr. Lindbergh made an unmistakable appeal to anti-Semitism."

N. Y. Herald Tribune, September 13, 1941

"Charles A. Lindbergh last night made the dirtiest speech he has yet made. For the first time, Lindbergh accused the Jews of trying to get America into the war. For the first time, he came out into the open with the Nazi venom that fits so well with the Nazi medal he has never given up."

PM, September 12, 1941

"If this attack of Lindbergh's on the Jews were merely an isolated instance of his way of thinking, the protests of the America First Committee that it does not constitute anti-Semitism might be listened to with more attention. But the attack follows too closely the tactics of Hitler, fits too snugly into the whole pattern of Fascist thinking to be simply a well intentioned piece of advice to American Jews, the cloak in which it is wrapped."

PM, October 5, 1941

"When Lindbergh came out in the open with his anti-Semitic brutality large numbers of such cooperators began to see the ultimate meaning and danger of such talk."

The Churchman, October 1, 1941

"The raising of the racial issue by Charles A. Lindbergh in his Des Moines, Iowa, speech is the most unfortunate happening that has occurred in the United States since the present tense situation developed.

"The assertion that the Jews are pressing this country into war is unwise, unpatriotic, and un-American. . . .

"But in his Des Moines speech he has done more to incite to hatred, bitterness, and mutual distrust than any other person on either side of this war-or-no-war controversy."

Journal-American, September 14, 1941

"After this, Mr. Lindbergh's virulently unconcealed appeal to anti-Semitism five days later could not be regarded as an isolated episode; . . ."

Herald Tribune, September 17, 1941

"There was no denying that, before Lindbergh spoke, anti-Semitism was one of the weeds that had already sprung up in America First's lush garden. But until Lindbergh publicly described the Jews as a danger to the U. S., anti-Semitism had not burst into full flower."

Time, October 6, 1941

That the wide latitude of characterization and comment currently availed of by the press is not a fresh development but is in the tradition of American journalism appears from any conventional historical survey. See Mott, AMERICAN JOURNALISM.

The District Court referred to the Know-Nothing movement, which in the elections of 1855 carried most of New

England, New York, Kentucky and California and gained some success in other States (R. 22). Of the literature of Know-Nothingism, R. A. Billington says in the PROTESTANT CRUSADE (pp. 7, 346):

"The literature of Know-Knothingism was vehement, bitter, vindictive, intolerant and untruthful. It appealed to the basest instincts and religious prejudices. Not only Irish and Catholics, but Germans, Italians, Hungarians, Swedes, Jews, and foreign-born citizens of every race and creed were the objects of its malicious attacks. The foreign-born employes in the Federal, State and municipal governments were classified and denounced. The most exaggerated and false statements were put out to the public with reference to the purposes and acts of the Catholic church, through its bishops and priests. . . .

"By 1838 an observer complained that books on the subject (anti-Catholicism) had become so numerous that it was impossible to read them all, and bookstores were established in the larger cities to deal solely in anti-Catholic works." . . .

The cross-fire of comment and attack on even the greatest figures in American history was not less vehement and embittered than the criticisms of public figures which fill our press today.

Of George Washington the *Aurora* said on December 23, 1796 (see Mott, *op. cit.*, p. 128):

"If ever a nation was debauched by a man, the American nation has been debauched by Washington. If ever a nation has suffered from the improper influence of a man, the American nation has suffered from the influence of Washington. If ever a nation was deceived by a man, the American nation has been deceived by Washington. Let his conduct then be an example to future ages. Let this serve to be a warning that no man may be an idol . . ."

Appendix

Of Thomas Jefferson the *New England Palladium* said (quoted in the *Hudson Bee*, September 7, 1802, see Mott, *op. cit.*, p. 169):

"Should the Infidel Jefferson be elected to the Presidency, the seal of death is that moment set on our holy religion, our churches will be prostrated, and some infamous prostitute, under the title of the Goddess of Reason, will preside in the Sanctuaries now devoted to the Most High."

Of Abraham Lincoln the *New York Herald* said:

"It is becoming too evident that, so far as a vicious, imbecile, demoralized Administration possesses power, the hideous horrors of civil war are about to be forced upon the country. The deliberations of Mr. Lincoln and his advisors have been shrouded in mystery; but the very concealment they have affected has betrayed their iniquitous purpose. . . .

". . . The masses of the population reprobate the blood-thirsty imbecility of the Washington government. They are forewarned, by the gigantic footsteps with which anarchy has been progressing, but a military despotism is imminent . . . the time cannot be distant when the shameful manner in which Mr. Lincoln and his cabinet are sacrificing the welfare of the land, and betraying its most sacred interests, will call forth an outbreak of indignation before which even Republican fanaticism and intolerance will tremble."

April 9, 1861, quoted in Nevins, AMERICAN PRESS OPINION, pp. 251-2

And again, during the campaign of 1864:

"No influence except compulsion can induce any respectable proportion of the people to cast their votes for that compound of cunning, heartlessness, and folly that they now execrate in the person of their Chief Magistrate."

March 19, 1861, quoted in Mott, *op. cit.*, p. 353

But instances need hardly be multiplied for anyone familiar with published criticisms of public matters during his own lifetime. Comment on public officials going far beyond the imputation of unpopular belief has been and is a commonplace practice of the American press. Any attempt to curb this traditional freedom, to force the press to keep to the bounds of a nice propriety, can succeed only at the expense of destroying the press as a useful instrument in a democracy.